IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 240 of 1985

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHANTILAL SILK MILLS

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

MR M J SHAH for Petitioner

MR B B Naik with Mr MANISH R BHATT for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE M.S.SHAH

Date of decision: 21/11/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

The following two questions have been referred to us for our opinion at the instance of the assessee in respect of assessment year 1976-77:

"(1) Whether on the facts and in the circumstances of the case, the assessee is

entitled for weighted deduction under section 35B(1) (b) in respect of commission of Rs. 72,157/- paid to brokers in India for securing orders for exports ?

(2) Whether on the facts and in the circumstances of the case, the assessee is eligible for weighted deduction under clause (viii) of section 35B(1) (b) in respect of brokerage of Rs.54,711/- paid in India for handling export activities at Bombay ?"

2. Mr Shah for the assessee submitted that in respect of assessment year 1975-76 and in respect of subsequent assessment years, the Tribunal and even the assessing officer have held in favour of the assessee in view of the decision of the Special Bench of Tribunal in the case of J. Hemchand. Learned advocate submitted that in view of the said decision in J. Hemchand, the assessee was entitled to get weighted deduction and that the departmental representative had conceded before the Tribunal that the department had accepted the decision in J. Hemchand, but because the departmental representative had no authority to make such concession before the Tribunal, the Tribunal decided the matter following the decision of the Madras High court in CIT vs. Southern Sea Foods Pvt. Ltd, 31 CTR 23. It is submitted by Mr. Shah for the assessee that the same view should have been taken by the Tribunal for the assessment year under consideration (i.e. assessment year 1976-77) which was taken for the previous year and subsequent years.

3. On the other hand, Mr. Naik for the revenue has opposed these submissions and has heavily relied upon the decision of the Supreme court in CIT vs. Stepwell Industries Ltd. 228 ITR 171.

4. After hearing the learned counsel for the parties, we are of the opinion that there is considerable substance in the submissions made by Mr. Naik. The following observations in the above judgment of the Supreme court leave no room for doubt that the Apex court did not approve of the decision of the Special Bench of Tribunal in J Hemchand case (supra):-

"The following question of law was sought to be referred to the High court:

`Whether on the facts and in the circumstances of

the case, the Appellate Tribunal was right in law in holding that the amount of Rs. 3,10,750 paid as commission to Singh and Co. and HREC is entitled to weighted deduction under section 35 B (1) (b) of the Income tax Act , 1961?'

The question was not referred to the High court because in the view of the Tribunal the case was concluded by the decision of the Tribunal in J Hemchand and Co. It is difficult to follow the logic of this decision of the Tribunal. When a claim for weighted deduction is made, it is for the assessee to satisfy the Income tax officer that the expenditure falls in any of the sub clauses of clause (b) of section 35B (1) (b) . The onus is on the assessee to prove that he is entitled to the weighted deduction allowed under section 35B.

In order to get this deduction, the assessee will have to prove that the expenditure was incurred during the previous year wholly and exclusively for the purposes set out in clause (b) of section 35 B. There cannot be any blanket allowance of the expenditure nor can there be any blanket allowance. Every case has to be discussed specifically and the expenditure must be found to be of the nature mentioned in any one of the sub clauses. If the expenditure does not fall in any of these categories, it cannot be allowed as a deduction. Some of the sub clauses provide that if the expenditure is incurred in India, it cannot be allowed but in some of the sub clauses this requirement is not there. In such cases, the expenditure may be or may not be incurred in India. Every case will have to be examined in the light of the provisions of the sub clauses and the facts proved by the assessee."

5. In view of the above principles laid down by the Apex court and considering the facts of the present case that brokerage in question was paid to brokers in India, we answer the questions in the negative, i.e. in favour of the revenue and against the assessee. The Reference stands disposed of accordingly. There shall be no order as to costs.

(D. M. Dharmadhikari, C.J.)

(M. S. Shah,J.)

parekh